UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FIREMAN'S FUND INSURANCE COMPANY,	***)***	
Plaintiff	***)***	
v.	***)***	***Docket No. 97-393-P-H***
ALLIED CONSTRUCTION COMPANY, INC.,	***)***	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The defendant moves to dismiss this action alleging negligence and breaches of contract and warranty in connection with the construction of a hotel on the ground that the action is barred by the applicable statute of limitations, 14 M.R.S.A. § 752. I recommend that the court grant the motion.

I. Standard of Review

The defendant brings its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

II. Factual Background

The following factual allegations in the complaint are relevant to the statute of limitations bar asserted by the defendant. The plaintiff is the subrogee of Berkeley Hotels Management, Inc., which in 1988 and 1989 entered into "an oral and/or written contract or agreement" with the defendant pursuant to which the defendant "designed, engineered and constructed" a building, presumably the Portland Jetport Hotel. Complaint (Docket No. 1) ¶¶ 1, 5-6. On or about October 21, 1996 the hotel was damaged as a result of "water incursion and flooding" resulting from the defendant's "defective design, engineering and/or construction" of the building. *Id.* ¶ 7. The plaintiff paid Berkeley Hotels Management, Inc. more than $200,000 under an insurance policy for the water damage. *Id.* ¶ 9.

Specifically, the defendant improperly designed, engineered and constructed the hotel so that rain water accumulated within the masonry facade, causing flooding under foreseeable weather conditions; failed to supervise the construction of the building properly, so as to prevent this problem; and failed to warn the plaintiff's insured about this problem. *Id.* ¶ 11. In addition, the defendant breached its contract with the plaintiff's insured and breached warranties of workmanlike performance and fitness for a particular purpose. *Id.* ¶¶ 16, 18-19.

III. Discussion

The defendant contends that all of the claims asserted in the complaint are barred by the statute of limitations set forth in 14 M.R.S.A. § 752, which provides:

> All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards, except actions on a judgment or decree of any court of record of the United States, or of any state or of a justice of the

peace in this State, and except as otherwise specially provided.

The complaint in this action was filed on December 19, 1997. Docket No. 1. The complaint alleges that the construction of the hotel took place in 1988 and 1989. Complaint ¶ 5. At first glance, therefore, this action appears to have been commenced well after the six-year limit imposed by the statute.

The plaintiff's first attempt to avoid the operation of section 752 is an argument that some portion of its negligence claim is subject instead to 14 M.R.S.A. § 752-A because the complaint alleges that the defendant designed and engineered the hotel in addition to constructing it. Section 752-A provides:

> All civil actions for malpractice or professional negligence against architects or engineers duly licensed or registered under Title 32 shall be commenced within 4 years after such malpractice or negligence is discovered, but in no event shall any such action be commenced more than 10 years after the substantial completion of the construction contract or the substantial completion of the services provided, if a construction contract is not involved. The limitation periods provided by this section shall not apply if the parties have entered into a valid contract which by its terms provides for limitations periods other than those set forth in this section.

The complaint, broadly construed in favor of the plaintiff, alleges that the basis for the claim was discovered on or about October 21, 1996. Complaint ¶ 7. The plaintiff points out that the complaint was brought well within the four-year limit of section 752-A after this discovery and less than ten years after construction was completed, presumably in 1988 or 1989.

However, the complaint fails to allege that the defendant is a licensed or registered architect or engineer. Indeed, corporations cannot be licensed as architects or registered as engineers under

Title 32 of the Maine Revised Statutes. 32 M.R.S.A. §§ 220(1)(C) (architects) & 1352 (engineers).[1] In addition, the Law Court has stated that section 752-A does not apply to claims against a construction firm. *Bangor Water Dist. v. Malcolm Pirnie Eng'rs*, 534 A.2d 1326, 1328 n.6 (Me. 1988). Section 752-A does not apply to the plaintiff's claims.

The plaintiff's alternate argument is that the defendant's negligence was undiscoverable until the damage occurred in 1996 and that it is therefore entitled to a "discovery rule" exception to section 752.[2] The complaint contains no factual allegations to support this argument and is therefore subject to dismissal for that reason alone. Even if the assertion that the negligence could not have been discovered before October 21, 1996 had been adequately pleaded, however, this court could not accept the plaintiff's invitation to create a discovery rule exception to section 752.

In *Johnston v. Dow & Coulombe, Inc*., 686 A.2d 1064 (Me. 1996), the Law Court made clear the extent of the discovery rule in Maine. "We have limited the application of the discovery rule to three discrete areas: legal malpractice, foreign object and negligent diagnosis medical malpractice, and asbestosis." *Id.* at 1066. Clearly, the facts presented here do not fit within any of these areas. In its most recent reported discussion of the discovery rule, the Law Court once again declined to

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[1] Chapter 32 specifically prohibits the licensure of corporations as architects. The requirements for registration as an engineer cannot be met by a corporation.

[2] The plaintiff does not discuss its claims for breach of contract and breach of warranty in its advocacy of the application of a discovery rule to the facts of this case. Such an exception to the statute of limitations has only been available under Maine law for certain tort claims. Since the cause of action for breach of contract accrues at the time of breach, *Dugan v. Martel*, 588 A.2d 744, 747 n.2 (Me. 1991), and the breach alleged here could only have occurred during construction of the hotel in 1988 and 1989, the plaintiff's claim for breach of contract in Count II of the complaint is barred by section 752. The claim for breach of warranties set forth in Count III is barred by the same statute of limitations, except to the extent that it alleges a breach of warranty on goods sold. That claim is also barred by a statute of limitations. 11 M.R.S.A. § 2-725 (four years); *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, Inc.*, 659 A.2d 267, 272 (Me. 1995).

extend the discovery rule to sexual abuse cases. *Harkness v. Fitzgerald*, 701 A.2d 370, 372 (Me. 1997). In *Bangor Water Dist.* the Law Court declined to extend the discovery rule to a claim against a construction company alleging that it had negligently installed water pipes two to four feet higher than shown in the plans provided to the customer and had not buried the pipes under the riverbed as they were supposed to be. 534 A.2d at 1327-28. The plaintiff attempts to distinguish *Bangor Water Dist*. on the ground that "it is not a tort case," Plaintiff's Answer to Motion to Dismiss and Incorporated Memorandum of Law ("Plaintiff's Memorandum") (Docket No. 5) at 9, apparently because no harm had occurred. The allegation at issue in *Bangor Water Dist*. was one of negligence, and the question of the availability of a discovery rule would not have arisen if it were not a tort case. The relevance of *Bangor Water Dist.* to the facts at issue here is not open to serious question.

This court should be extremely reluctant to conclude that the Law Court would create another exception to the applicability of section 752, particularly when it has repeatedly declined to do so.[3] *E.g., Johnston*, 686 A.2d at 1067 (negligence of land surveyor); *Kasu Corp. v. Blake, Hall & Sprague, Inc.*, 582 A.2d 978, 980 (Me. 1990) (failure to procure insurance). I see no reason to overcome that reluctance in this case.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED.**

[3] The plaintiff's contention that this court "applied the discovery rule to an undiscoverable tort" in *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33 (D. Me. 1994), Plaintiff's Memorandum at 5-6, despite the lack of any mention of the discovery rule in that opinion, is simply incorrect.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of March, 1998.

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David M. Cohen
United States Magistrate Judge